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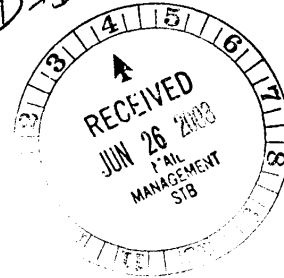
via Hand Delivery

Hon. Vernon A. Williams
Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423

FILED

JUN 26 2003

**SURFACE
TRANSPORTATION BOARD**



**Re: Procedures to Expedite Resolution of Rail Rate Challenges to be Considered
Under the Stand-Alone Cost Methodology, STB Ex Parte No. 638**

Dear Secretary Williams:

Enclosed for filing in the above-captioned matter on behalf of The Burlington Northern and Santa Fe Railway Company ("BNSF") are the original and 10 copies of BNSF's Petition for Reconsideration.

Please date stamp the extra copy of this cover letter and return it to the messenger who delivered this filing.

Sincerely,

Anthony J. LaRocca

Enclosures

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**SURFACE
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Office of Proceeding

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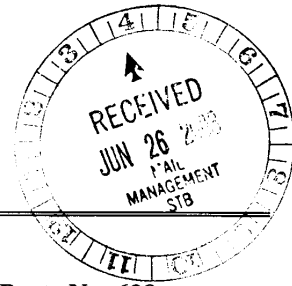
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**BEFORE THE
SURFACE TRANSPORTATION BOARD**



**PROCEDURES TO EXPEDITE RESOLUTION
OF RAIL RATE CHALLENGES TO BE
CONSIDERED UNDER THE STAND-ALONE
COST METHODOLOGY**

STB Ex Parte No. 638

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**SURFACE
TRANSPORTATION BOARD**

BNSF'S PETITION FOR RECONSIDERATION

**SURFACE
TRANSPORTATION BOARD**

Pursuant to 49 C.F.R. § 1115.3, The Burlington Northern and Santa Fe Railway

Company ("BNSF") hereby requests that the Board reconsider its June 6, 2003 decision in this proceeding ("June 6th Decision") requiring parties in stand-alone cost ("SAC") cases simultaneously to file highly confidential and public versions of SAC evidence. BNSF supports the Board's efforts to ensure greater public access to evidentiary filings in SAC cases. However, as explained in more detail below, BNSF believes that the requirement of simultaneous filings of highly confidential and public versions of SAC evidence increases the risk of inadvertent disclosures of highly confidential information, and that the need to protect against inadvertent disclosures outweighs any public interest in immediate access to SAC filings. BNSF's recent experience with SAC filings confirms the importance of a brief interval between the filing of highly confidential and public versions of SAC evidence. BNSF therefore requests that the Board reconsider its June 6th Decision and amend its existing regulations to allow a brief interval between the filing of a highly confidential and a public version of SAC evidence.

BACKGROUND

BNSF has previously submitted comments in this proceeding and participated in the Board's hearing held on February 27, 2003. Although the Board did not request comments in this proceeding related to public access to SAC evidence, the issue arose during the Board's February 27th hearing. Thereafter, in a decision served April 3, 2003 ("April 3rd Decision"), the

Board expressed concern that parties to SAC cases typically treat their entire evidentiary filing as highly confidential and therefore file all evidence under seal. The Board noted that the public interest requires each party to prepare a partially redacted version of its evidence that opposing counsel can share with in-house personnel and a fully redacted version of evidence to be filed in the public docket. The Board stated that it would review existing protective orders in pending rail rate cases to ensure that they comply with its expectations regarding in-house and public access to evidentiary filings. April 3rd Decision at 9.

In a subsequent order served on April 25, 2003 ("April 25th Decision"), the Board invited the parties in pending rail rate cases to review their existing protective orders and jointly propose any modifications needed to comply with the April 3rd Decision. In response to this invitation, the various parties in the pending rail rate cases, including BNSF, filed proposed modifications to their protective orders. Most of the parties proposed that they file highly confidential versions of SAC evidence on the date required in their respective procedural schedules and that there be a three-business-day delay for the filing of public versions.¹

In a decision served on June 6, 2003 ("June 6th Decision"), the Board determined that the timing of public filings is governed by the Board's regulations and is not an appropriate matter for negotiation or waiver by the parties in a protective order.² The Board therefore rejected the parties' proposal for a three-day delay in filing public versions of SAC evidence and required the

¹ See Joint Proposal to Modify Protective Orders in Docket Nos. 41185, 41191, 42056 and 42077 at 3 (filed May 9, 2003); Joint Motion to Amend the Protective Order in Docket No. 42054 at 2 (filed May 9, 2003); Joint Motion to Amend the Protective Orders in Docket Nos. 42057 and 42071 at 3 (filed May 9, 2003); and Joint Filing Concerning Modification of Protective Order in Docket No. 42058 at 2 (filed May 9, 2003).

² The June 6th Decision was issued in Ex Parte No. 638, identified the pending rate cases as embraced cases, and modified the protective orders in those proceedings.

parties in SAC cases simultaneously to file highly confidential and public versions of SAC evidence.

ARGUMENT

Much of the information at issue in a SAC analysis involves sensitive commercial and proprietary data from the parties. In recognition of the sensitivity of the information in a SAC case, the Board routinely approves protective orders in SAC proceedings to “ensure that the material produced, in response to a discovery request or otherwise, will be used only in connection with this proceeding and not for any other business or commercial purpose.”³ These protective orders permit the parties to file materials containing highly confidential information under seal with the Board. In recent SAC cases, the parties have submitted their entire evidentiary presentations under seal to protect the confidential information contained in those filings. The Board has correctly noted that such a practice is overprotective of the confidential information contained in those filings and deprives the public of access to information to which it is entitled.

BNSF agrees that it is proper to require the filing of non-confidential versions of SAC evidence. However, BNSF believes that the public interest in access to SAC filings and the interest of the parties in the protection of commercially sensitive information relied upon in SAC filings are best accommodated by allowing a brief interval between the filing of a highly confidential and public version of SAC evidence. There are several reasons the Board should reconsider its June 6th Decision and adopt such an interval.

First, a three-day interval between the filing of highly confidential evidence and a public version of such evidence would reduce the possibility of inadvertent disclosure of highly

³ STB Docket No. 42071, *Otter Tail Power Co. v. The Burlington Northern and Santa Fe Ry. Co.*, slip op. at 2 (served Mar. 6, 2002).

confidential material. Despite careful planning and preparation, the parties' SAC filings are often finalized shortly before the filing deadline, leaving little time for the in-depth review required to prepare a public version. A brief interval between the filing of highly confidential and public versions of the evidence would reduce the chance of a mistake in the redaction of highly confidential information.

The value of a brief interval between the filing of highly confidential and public versions of SAC evidence in avoiding inadvertent disclosures of confidential information is confirmed by BNSF's recent experience. BNSF and the Public Service Company of Colorado d/b/a Xcel Energy ("Xcel") filed rebuttal evidence in STB Docket No. 42057 before the Board issued its June 6th Decision. These were the first major SAC evidentiary filings in several years to be submitted in both highly confidential and public versions. Outside counsel for Xcel prepared a proposed public version of its rebuttal filing for review by BNSF's counsel after Xcel's highly confidential filing had been submitted to the Board. The purpose of the exchange was to allow BNSF's counsel to review Xcel's proposed redactions and to determine if any commercially sensitive or proprietary information inadvertently remained in the proposed public version. While Xcel's counsel had made a good faith effort to identify highly confidential information in its initial redactions, several changes in the redactions were found to be necessary. Without the exchange of proposed redactions in advance of filing, it is possible that highly confidential information would have been inadvertently disclosed.

Second, BNSF's proposal would reduce the risk of future disputes over the disclosure of a party's highly confidential information by allowing the parties to confer regarding potentially problematic redactions. The highly confidential information contained in SAC evidence often involves information provided by the other party. For example, the complainant's SAC evidence usually relies extensively on confidential information from the defendant. The complainant may

not be as sensitive to the confidentiality of certain information as the defendant. Even if the complainant acts in good faith, it may fail to redact information that a defendant considers to be highly confidential. A brief delay between the filing of highly confidential and public versions of SAC evidence would allow the parties to consult about the proper redaction of highly confidential information in cases where there is any doubt.

Third, if highly confidential and public versions are filed simultaneously, the parties may overredact to protect against inadvertent disclosures of highly confidential information or to avoid disputes with the producing parties. The public's interest in access to the SAC filings would be better served by providing the parties with sufficient time to confer with one another so that redactions to public versions of SAC evidence may be limited.

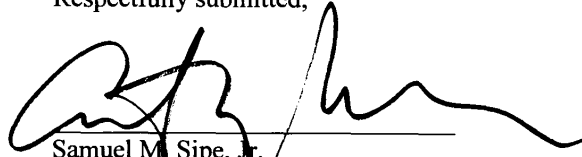
Fourth, there is no significant public interest in having immediate access to a public version of a SAC filing. The public is clearly entitled to review the record of important proceedings such as those involving challenges to railroad rates. But there is no compelling reason for non-parties to have immediate access to the information on the same day that highly confidential filings are submitted for the Board's review. A three-day interval would not unduly delay review of these submissions by interested members of the public.

BNSF is not seeking special treatment for parties to SAC cases before the Board. Other agencies have recognized the need to provide a brief interval between the filing of materials containing highly confidential information and the filing of public versions. For example, the Federal Communications Commission allows a five-day interval. 47 C.F.R. § 76.9(b). The Department of Commerce allows a one-day interval. 19 C.F.R §§ 207.3(c) and 351.303(c)(2)(iii).

CONCLUSION

For the reasons stated above, BNSF requests that the Board reconsider its June 6th Decision and amend its existing regulations to allow a three-business-day interval between the filing of a highly confidential version and a public version of SAC evidence.

Respectfully submitted,



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June 26, 2003

CERTIFICATE OF SERVICE

I hereby certify that this 26th day of June 2003, a copy of BNSF's Petition for

Reconsideration was served by hand delivery or overnight mail on:

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